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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

DENA HOSPODKA,

Plaintiff and Appellant,

v.

J. ROCKCLIFF, INC., ET AL.,

Defendants and Respondents.

A153991

(Contra Costa County
Super. Ct. No. MSC12-02000)

Dena Hospodka appeals from an order and judgment following settlement of her breach of contract case against J. Rockcliff, Inc., which denies her attorney's fees under Civil Code section 1717 (section 1717) on the ground that there was no prevailing party in this action. We review the trial court's prevailing party determination under the abuse of discretion standard except to the extent it hinges on questions of law, which we review de novo. (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332.) Here, we find no abuse of discretion and, therefore, affirm the order and judgment.

BACKGROUND

In August 2012, Hospodka filed a complaint against several individual and doe defendants. Hospodka alleged that when she previously worked as a real estate agent for defendant Jeff Sposito, she was the listing agent for three properties, which were sold after she left Sposito's employment. In this opinion, we refer to those properties as Red Fir Court, Alamo Springs, and Country Club Place. According to Hospodka, commission and/or referral fees (commissions) that were owed to her for these sales were paid

erroneously to other named defendants. She alleged 17 causes of action, including claims for conversion, unfair business practices, breach of contract, fraud, and interference with contract. She sought \$57,537.50 in damages for the unpaid commissions, \$250,000.00 in punitive damages, and attorney's fees and costs as provided for by agreement or by law.

In April 2013, Hospodka filed a first amended complaint, which reduced her causes of action to two, breach of contract and declaratory relief. Hospodka alleged that her work as a real estate salesperson for Sposito was performed pursuant to an Independent Contractor Agreement (ICA) with Sposito's real estate brokerage corporation, which underwent several name changes, eventually becoming Rockcliff. She further alleged that Sposito breached the ICA by failing to pay her commissions in connection with the three aforementioned properties, and that she was also entitled to recover attorney's fees that she incurred to enforce the ICA.

The ICA, which was attached to Hospodka's complaint, contains an attorney's fees clause, which states: "If either party to this Agreement shall bring any action, suit, cross-claim, counterclaim, appeal, arbitration or mediation for any relief against the other, declaratory or otherwise, to enforce the terms hereof or to declare rights hereunder (collectively, an 'Action'), the losing party shall pay to the prevailing party a reasonable sum for attorneys' fees and costs incurred in bringing and prosecuting or defending such Action and/or enforcing any judgment, order, ruling or award (collectively, a 'Decision') granted therein, all of which shall be deemed to have accrued on the commencement of such Action and shall be paid whether or not such Action is prosecuted to a Decision. Any Decision entered in such Action shall contain a specific provision providing for the recovery of attorneys' fees and costs incurred in enforcing such Decision. . . . 'Prevailing Party' within the meaning of this Section includes, without limitation, a party who agrees to dismiss an Action on the other party's payment of the sums allegedly due or performance of the covenants allegedly breached, or who obtains substantially the relief sought by it." (Emphasis omitted.)

In June 2014, Hospodka filed a second amended complaint, which named Rockcliff as a defendant instead of Sposito. Pursuant to causes of action for breach of

contract, declaratory relief, fraud, and conversion, Hospodka continued to allege liability for refusing to pay her commissions for the Red Fir, Country Club Place, and Alamo Springs properties. She also added a claim for failure to pay her a commission following the sale of a property referred to as Blackhawk, increasing her prayer for damages accordingly. In September 2014, Hospodka filed a third amended complaint and, in December 2015, her operative fourth amended complaint.

The Fourth Amended Complaint alleged nine causes of action against various groups of defendants. The first four causes of action pertained to the Red Fir, Alamo Springs and Country Club Place properties. Hospodka alleged claims for (1) breach of contract, (2) declaratory relief, (3) fraud in connection with the sale of Red Fir, and (4) conversion relating to the sales of Alamo Springs and Country Club Place. Rockcliff was a named defendant in each of these causes of action, pursuant to which Hospodka sought damages of no less than \$57,537.00 plus prejudgment interest, as well as punitive damages, attorney's fees and costs. The remaining five causes of action pertained to the Blackhawk sale. Hospodka alleged claims for (5) breach of contract, (6) intentional misrepresentation, (7) declaratory relief, (8) intentional interference with contract, and (9) breach of the covenant of good faith and fair dealing. Rockcliff was a named defendant as to each of these causes of action, except for the intentional interference claim. For these Blackhawk claims, Hospodka sought damages of no less than \$129,820.00 plus prejudgment interest, as well as punitive damages, attorney's fees and costs.

A trial date was set for October 28, 2016. By that time, Hospodka had voluntarily dismissed her second and seventh causes of action for declaratory relief. Moreover, the trial court had granted Rockcliff summary adjudication of the third cause of action for fraud, although it left open the possibility of reinstating the claim to conform to proof at trial. Despite these events, Hospodka filed an issue conference statement increasing her damages estimate relating to Blackhawk to \$152,706.50. But then, the day before the scheduled trial date, Hospodka filed a voluntary dismissal with prejudice, that dismissed Rockcliff from every cause of action pertaining to the Blackhawk sale, as well as the third and fourth causes of action pertaining to the other three properties. At that point,

Hospodka's only remaining claim against Rockcliff was her first cause of action for breach of contract by failing to pay commissions for the Red Fir, Alamo Springs and Country Club Place properties.

The trial date was continued several more times and finally reset for May 2017. Prior to that date, Hospodka and Rockcliff agreed to a settlement, which was memorialized in a June 2017 settlement agreement. On June 30, the parties appeared before the judge who previously conducted their settlement conference. They advised the court that the settlement they negotiated left three issues for the court to decide: attorney's fees, costs, and expert fees. Hospodka's counsel stated that he would file a motion for attorney's fees and wanted to attach a copy of the settlement agreement, but there was a concern about confidentiality so the parties wanted to "work out a procedure with the Court as to how we can keep the motion for attorney's fees and the settlement agreement confidential and out of the public eye." Without substantive discussion, the judge and parties quickly agreed that the settlement agreement would be filed under seal that day and that all "paperwork" associated with Hospodka's motion for attorney's fees and costs would also be filed under seal.

The superior court's Register of Actions contains the following information about proceedings that were conducted subject to the sealing order: In August 2017, Hospodka filed a memorandum of costs and motion for attorney's fees, seeking a total award of \$181,172.00. Following briefing and a hearing, the trial court denied the motion for attorney's fees in an order filed January 22, 2018. On February 1, 2018, judgment was entered denying Hospodka's motion for attorney's fees, costs and expert fees. The judgment states that Hospodka "cannot be considered the prevailing party on the contract," that the settlement in this case was such that both parties could "legitimately claim some success," and that "there [was] no prevailing party [on] the contract."

DISCUSSION

Hospodka contends that section 1717 entitles her to an award of contractual attorney's fees because the relief she obtained pursuant to the settlement agreement makes her the prevailing party in this case as a matter of law.

I. The Sealed Record

The settlement agreement and other documents that were sealed by the trial court were filed under seal in this court. The parties request that this court conduct our review without disclosing any of this sealed evidence, but we decline to do so because the parties did not follow the procedure for sealing court records, which is established by the California Rules of Court.¹

Rule 2.550 sets forth the procedure for sealing records in the trial court. This rule implements a presumption that court records are open unless confidentiality is required by law. (Rule 2.550(c).) To overcome this presumption as to each document for which confidentiality is requested, the trial court must make express findings that: “(1) There exists an overriding interest that overcomes the right of public access to the record; (2) The overriding interest supports sealing the record; (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) The proposed sealing is narrowly tailored; and (5) No less restrictive means exist to achieve the overriding interest.” (Rule 2.550(d).) Facts supporting these findings must be “[s]pecifically state[d]” in a formal court order, which must “[d]irect the sealing of only those documents and pages, or, if reasonably practicable, portions of those documents and pages, that contain the material that needs to be placed under seal. All other portions of each document or page must be included in the public file.” (Rule 2.550(e).)

In the present case, the parties did not make the showing required to seal any court record. Instead, after negotiating an agreement that ostensibly settled their dispute, the parties asked the court to adjudicate an unresolved attorney’s fees claim based on a sealed record because they wanted to shield the terms of their settlement from public view. The trial court erred by granting this request without following the procedure for sealing court records. Moreover, the error was compounded when the sealed records were filed under seal in this court without the required trial court order or any supporting documentation. (See rule 8.46(b)(2).)

¹ All citations to rules refer to the California Rules of Court.

Prior to oral argument before this court, we notified the parties that we were considering unsealing the sealed documents in this record on our own motion and invited them to file letter briefs. (Rule 8.46(e).) Hospodka readily agrees with our proposal and goes a step further by arguing that lack of adherence to the court rules “mandates” that all documents in this record be unsealed. Rockcliff takes the opposite view, emphasizing that the trial court sealed these records without objection from Hospodka, and arguing that “public disclosure of the Confidential Records would substantially prejudice Rockcliff and its business interests.” According to Rockcliff, unsealing the documents at this late stage would be fundamentally unfair because confidentiality was a material term of the parties’ settlement agreement. Thus, Rockcliff asks this court to conduct our own analysis under rule 2.550 and order that the records remain sealed.

Rockcliff misperceives the purpose of the procedure for sealing court records. “A strong presumption exists in favor of public access to court records in ordinary civil trials. [Citation.] That is because ‘the public has an interest, in all civil cases, in observing and assessing the performance of its public judicial system, and that interest strongly supports a general right of access in ordinary civil cases.’ ” (*In re Marriage of Nicholas* (2010) 186 Cal.App.4th 1566, 1575.) “Open court records safeguard against unbridled judicial power, thereby fostering community respect for the rule of law. ‘If public court business is conducted in private, it becomes impossible to expose corruption, incompetence, inefficiency, prejudice, and favoritism. For this reason traditional Anglo-American jurisprudence distrusts secrecy in judicial proceedings and favors a policy of maximum public access to proceedings and records of judicial tribunals.’ ” (*Ibid.*)

Thus, the trial court erred by failing to protect the public’s right of access regardless of the parties’ desire to disregard the procedures set forth in rule 2.550(c)–(e). Moreover, Rockcliff’s request that this court seal documents that were improperly sealed below is doubly improper. The trial court’s broad ruling purported to cover the settlement agreement and all records pertaining to the attorney’s fee motion including the order and judgment. It is not our role to cull through hundreds of pages of documents

and decide which of them or which parts of them satisfy the detailed criteria for sealing documents, especially without any preliminary showing by the parties.

However, we must also consider that Hospodka actively participated in this rule violation, which may have enabled her to secure a settlement that would not otherwise have occurred. Under these circumstances, instead of immediately unsealing all the records that were improperly filed under seal, we will order all documents sealed in this court to be unsealed 60 days after issuance of the remittitur, except if, and to the extent that, in the intervening period the trial court issues a new order containing the requisite findings and ordering limited portions of the record to remain sealed. In this opinion we limit our discussion of the evidence to those facts appropriate to a proper consideration and resolution of this appeal, none of which are properly sealed.

II. Section 1717 Attorney's Fees

Section 1717, subdivision (a) authorizes an award of reasonable attorney's fees to the prevailing party in an " 'action on a contract' " if the contract provides for such an award. (See *Eden Township Healthcare Dist. v. Eden Medical Center* (2013) 220 Cal.App.4th 418, 425.) Section 1717, subdivision (b)(1) (section 1717(b)(1)) defines the prevailing party as "the party who recovered a greater relief in the action on the contract," but this provision also gives the trial court discretion to determine there was no prevailing party. In determining whether there is a prevailing party, the trial court compares "the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources." (*Hsu v. Abbata* (1995) 9 Cal.4th 863, 876 (*Hsu*).)

Here, a comparison of Hospodka's demands with the relief she ultimately recovered supports the trial court's conclusion there was no prevailing party. In her operative complaint (as modified by her pretrial issue conference statement), Hospodka sought more than \$200,000 in damages for unpaid commissions allegedly due to her under the ICA, as well as prejudgment interest and punitive damages. However, the settlement agreement provided that she would receive a significantly smaller payment for her actual damages along with prejudgment interest and no punitive damages.

Consideration of the parties' litigation objectives reinforces the reasonableness of the trial court's finding there was no prevailing party. Prior to settlement, Hospodka dismissed all but one of her causes of action against Rockcliff. Importantly, she dismissed all claims based on the Blackhawk sale, for which she had demanded considerably more damages than the other three properties combined. By contrast, the settlement terms show that Rockcliff achieved significant victories: it resolved claims relating to all four properties, including Blackhawk, without having to incur the expense of a trial; it agreed to pay significantly less than Hospodka demanded in her complaint; and its payment was subject to an express denial of actual liability. Under these circumstances, the trial court concluded reasonably that neither party obtained "a 'simple unqualified win' entitling the winner to fees," but rather that there was no prevailing party because this case involved a " 'mixed result' " so that " 'opposing litigants could each legitimately claim some success in the litigation.' " (*de la Cuesta v. Benham* (2011) 193 Cal.App.4th 1287, 1293, quoting *Hsu, supra*, 9 Cal.4th at pp. 875 & 876, emphasis omitted.)

Hospodka contends the trial court did not have discretion to find that there was no prevailing party because she achieved a simple unqualified win. She reasons that because "[t]he prevailing party determination is to be made only upon final resolution of the contract claims" (*Hsu, supra*, 9 Cal.4th at p. 876), the only cause of action that can be considered for purposes of determining the prevailing party in this case is the single cause of action that had not yet been dismissed when the attorney's fees motion was decided, i.e. the first cause of action alleging that Rockcliff breached its contractual obligation to pay commissions on Red Fir, Alamo Springs and Country Club Place. As to that claim, Hospodka argues, the size of Rockcliff's settlement payment made Hospodka the unqualified winner. This reasoning is specious. The fact that a prevailing party determination must await final resolution of the parties' claims is a temporal requirement. It does not restrict the circumstances a court may consider when it finally does make a prevailing party determination at the conclusion of the proceeding.

Hospodka also contends that Section 1717, subdivision (b)(2) (section 1717(b)(2)) explicitly precludes trial courts from considering voluntarily dismissed claims when making a prevailing party determination. (Citing *Santisas v. Goodin* (1998) 17 Cal.4th 599, 617.) This is ironic, as section 1717(b)(2) treats voluntarily dismissed claims and settled claims identically. The statute provides, “[w]here an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section.” (See *Mesa Shopping Center-East, LLC v. O Hill* (2014) 232 Cal.App.4th 890, 902.) Neither party may recover its attorney’s fees incurred in connection with such claims on a contract even if the contract itself authorizes recovery of those fees.² (*Santisas*, at p. 617; accord *Mitchell Land & Improvement Co. v. Ristorante Ferrantelli, Inc.* (2007) 158 Cal.App.4th 479, 486 (*Mitchell Land*).) More importantly, Hospodka’s argument rests on a misreading of *Santisas*. That case holds that in “voluntary pretrial dismissal cases,” section 1717(b)(2) bars recovery of attorney’s fees incurred to defend a contract claim but does not bar recovery of fees incurred to defend a noncontract claim. (*Santisas*, at p. 602.) *Santisas* does not necessarily preclude a trial court from considering dismissed claims when conducting a prevailing party determination. (*Santisas* would prevent Rockcliff from obtaining fees as a prevailing party on the voluntarily dismissed claims, but Rockcliff has not sought such fees).

Hospodka relies heavily on *CDF Firefighters v. Maldonado* (2011) 200 Cal.App.4th 158 (*CDF*). In that case, a union alleged that a former member breached his contractual obligation to pay two fines that were levied against him in two separate incidents. After six years of litigation, the defendant secured a partial judgment on the pleadings as to one claim for payment of a \$22,790 fine. Then the union dismissed the

² Hospodka argues that section 1717(b)(2) does not preclude her from being the prevailing party because her action had not yet been dismissed pursuant to the settlement agreement at the point when her attorney’s fees motion was adjudicated. (See *Jackson v. Homeowners Assn. Monte Vista Estates-East* (2001) 93 Cal.App.4th 773, 786, fn. 9 [§ 1717, subd. (b)(2) has no effect in case where “no voluntary dismissal has yet been entered”].) We have no occasion to consider this argument, as we affirm the trial court’s order without resort to the bright line rule of section 1717(b)(2).

remaining claim for payment of a \$743 fine. Thereafter, the trial court denied the defendant's motion for attorney's fees under section 1717 on the ground that section 1717(b)(2) provides that there " 'shall' " be no prevailing party " '[w]here an action has been voluntarily dismissed.' " (*Id.* at pp. 160–161.) Reversing the judgment on appeal, the *CDF* court reasoned that the union's two causes of action were so distinct they could have been filed as separate lawsuits and that the dismissal of the claim for \$743 did not negate the defendant's prevailing party status as to the \$22,790 fine that was adjudicated in his favor. (*Id.* at pp. 165–166.)

Hospodka contends she is in the same position as the *CDF* defendant in that her failure to prevail on the Blackhawk contract claims does not negate her status as the prevailing party on the claims pertaining to the Red Fir, Alamo Springs and Country Club sales. This analogy fails because, unlike the prevailing party in *CDF*, Hospodka did not prove the merits of any of her causes of action. She voluntarily dismissed and/or settled all of her claims, except for the fraud claim, which was summarily adjudicated in favor of Rockcliff. Also, the defendant in *CDF* prevailed on a claim that dwarfed in size the claim the plaintiff then voluntarily dismissed, whereas here Hospodka voluntarily dismissed the larger of her two sets of claims.

Hospodka contends that the trial court abused its discretion by using Rockcliff's "interim victories" as a legal basis for denying the attorney's fees motion. According to Hospodka, the circumstances pursuant to which her 17 causes of action were whittled down to nine and then to one cannot be considered at all in determining who was the prevailing party in this case. Hospodka cites no authority supportive of this theory, instead invoking an inapposite rule that "fees under section 1717 are awarded to a party who prevailed on the contract overall, not to a party who prevailed only at an interim procedural step." (*DisputeSuite.com, LLC v. Scoreinc.com* (2017) 2 Cal.5th 968, 977.) First, nobody was awarded fees in this case—for an interim victory or otherwise. Second, the fact that an interim victory does not constitute a final win does not mean that interim victories are irrelevant. The prevailing party determination entails a comparison of the plaintiff's ultimate recovery with the parties' initial demands as well as their

“litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources.” (*Hsu, supra*, 9 Cal.4th at p. 876.) The trial court made the relevant inquiry here and the record provides no basis for concluding that its discretion was abused.

Finally, both parties anticipate they will prevail in this appeal and request appellate attorney’s fees pursuant to the ICA as well as a provision in their settlement agreement, which authorizes a fee award for enforcing a settlement term. We conclude that appellate attorney’s fees are not recoverable in this action. First, because we affirm the trial court’s determination there is no prevailing party under the ICA, fees are not recoverable under section 1717. Second, the parties excluded Hospodka’s attorney’s fees claim from their settlement agreement in order to secure a court ruling on that matter. Accordingly, this appeal from the order denying Hospodka’s motion is not an action to enforce a settlement term.

DISPOSITION

The order denying Hospodka’s motion for attorney’s fees is affirmed. All documents the parties filed under seal in this court are ordered unsealed, effective 60 days after issuance of the remittitur, unless by that date either party has filed a motion in this court seeking to leave limited portions of the record sealed and has supported that motion with an appropriate trial court order sealing such documents. The matter is remanded to the trial court for the purpose of considering motions by either party under Rule 2.551. Rockcliff may recover costs on appeal.

TUCHER, J.

WE CONCUR:

POLLAK, P. J.

STREETER, J.